CHAPTER 2. *Citizen Participation and the Public Process*

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Growth management challenges Washington communities to deal effectively with difficult issues. Addressing these issues requires a thorough understanding of citizen participation and the legal requirements of the public process.

The first part of this chapter, **Citizen Participation**, focuses on the role of community residents in land use planning. It also introduces the most popular public involvement techniques local governments can use to encourage citizen participation, and guidelines for planning successful public meetings and work sessions.

The Public Process, which follows, provides an overview of the legal requirements for public involvement, meetings, and access to records. It also outlines how to introduce properly, deliberate, and adopt municipal codes and ordinances, including the Appearance of Fairness doctrine.

Part 1: Citizen Participation

A. What is Citizen Participation?

Citizen participation in community affairs is as old as democracy; yet any attempt to define citizen participation is difficult. Citizen participation means different things to different people. Some view it as the task of electing representatives and voting on specific issues. Others define it as having an active voice in influencing local government decisions.

In land use activities, for example, citizens can testify at a public hearing; attend a workshop to create goals for the community comprehensive plan; serve a term on the planning commission; or answer a public opinion survey to identify community planning priorities. In other words, citizen participation in local government involves the people, in some fashion, in land use decisions. The traditional roots of contemporary participation are found in the town hall form of direct democracy. The fundamental justification for citizen participation is the premise that people have a right to participate in decisions that affect them.

Citizen participation is an established part of the land use planning and regulatory process in Washington state. All state planning laws require citizen participation—through public hearings—before plans or regulations are adopted, or before granting land development permits.

Emphasis on citizen participation in Washington has increased significantly following the Growth Management Act of 1990. The goals of the Act include, "Encourage the involvement of citizens in the planning process."[1] Although the Act does not further define citizen participation, the procedural criteria for adopting comprehensive plans and development regulations stress "that the process should be a 'bottom up' effort, involving early and continuous public participation, with the central locus of decision-making at the local level."[2]

The Growth Management Act also states:

> *"Each county and city...shall establish . . . procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments."*[3]

This requirement provides overall guidance, but leaves local governments free to tailor a more detailed definition of citizen participation to fit community needs.

B. Who Should Be Involved?

State planning laws and local ordinances spell out the need to involve elected and appointed officials closely in local land use planning. A broad range of citizen groups and committed individuals (generally referred to as "citizens" or "the public") must also be involved. A brief overview of these participants includes:

City councils and boards of county commissioners set policy, make final decisions on plans and land development

permits, adopt ordinances, approve budgets for planning, and appoint members of the planning commission.

Planning commissioners are volunteer citizens with legal responsibility to review plans and projects. They do not make final decisions, but must make recommendations before elected officials can adopt comprehensive plans. Planning commissioners are non-partisan appointed officials who represent the general values of the community in land use decision making. They also serve as a sounding board for new ideas, promote community interest in planning, and furnish leadership in formal citizen participation programs.

Most larger cities in Washington state and its 39 counties have a **professional planning staff**, who bring technical expertise and knowledge to the land use planning process. Historically, the planning staff serves as advisers to elected officials and planning commissions. They conduct studies, administer planning regulations (such as zoning and subdivision ordinances), and are a resource for the public on land use planning activities. In smaller communities without professional staff, consultants sometimes are hired on a limited basis to provide technical assistance.

Typically, nearly everyone outside this formal structure who could be involved in the land use planning process is termed **"the citizens"** or **"the public"**—neither entirely appropriate. Citizens in a community are not a single homogeneous entity. They represent a broad spectrum of ideas and opinions, often with conflicting goals and values. The "citizens" are a diverse collection of individuals and groups: neighborhood associations; public interest groups, such as the local chapter of the Sierra Club; or special interest groups like the local chamber of commerce. Many are individuals intensely interested in planning issues, while there are citizens who pay little or no attention to the community's land use planning activities.

What these diverse groups share is a willingness to volunteer some of their free time for community planning activities. Motivations to participate range from believing that citizens must be involved in community affairs to maintain the rights and privileges of a free democratic society; to reasons of self interest, prestige, professional recognition, or an increase in business contacts.

Not everyone is interested in a formal citizen participation program. However, all citizens in the community must be given an opportunity to express their views and concerns, and

have them considered as decisions are made. Local government must make opportunities for citizen participation in land use planning accessible to everyone. It is up to the citizens to take full advantage of these opportunities.

C. Citizen Involvement: A Matter of Timing

No matter when officials invite or recruit citizen participation in land use planning, it will not be soon enough for some interest groups. Others will complain that participation is starting too early. Controversy over the topic of when to invite or recruit citizen involvement can only be settled by local officials. Citizens can be involved from the beginning, or at selected steps in the process.

Citizen mistrust, or lack of support for plans and projects, often has more to do with a lack of opportunity to participate early in the project than on its merits. Citizen participation in the earliest stages of land use planning will save time and agony for officials and planners in the long run. The longer participation is put off, especially in major planning or development issues, the more likely that rumor and misinformation will spread. When this happens, officials spend more time explaining what is not true than reviewing the pros and cons of the project.

Another good reason for early participation is to identify disagreements or conflicts. Conflicts are abundant in land use planning. A healthy airing of conflicting views early on encourages creative problem solving and productive conflict management. Delaying citizen participation does not reduce or avoid conflicts. Conflict can cause poor utilization of resources, delay important planning efforts, and, on occasion, result in the loss of desirable development projects.

Citizen participation efforts will fail if the deciding officials have not defined their expectations and responsibilities at the beginning. Elected and appointed officials must make a strong public commitment to announced citizen participation activities. They must define clearly what the purpose of any formally announced participation program will be; and there should be a written document that clearly states how officials will invite, review, and process citizens' information. People are more likely to devote time and energy to local planning activities if they know their officials are accountable.

D. Methods for Encouraging Citizen Participation

Citizen participation must be carefully planned and organized. Activities should be simple, straightforward, and manageable by officials, planning commissioners and staff; and designed to fit local values and available resources.

The extent and intensity of any participation activity should match the importance of the issue. Widespread participation is desirable when comprehensive plans or land development ordinances are being created or updated. Participation efforts can be on a smaller scale if the issue mainly interests a particular neighborhood or area.

The best that can be done in any community is to see that citizen participation activities are open and accessible to anyone who wishes to be involved; that they do not require citizens to have special technical knowledge; and that there are clear lines of responsibility and accountability.

Two methods are key to successful citizen participation: interaction and public information. Public information methods are a time-honored way to inform citizens about land use plans and projects. Interactive methods create a dialog between citizens, elected and appointed officials, and professionals.

1. Public Information

Citizens need to be informed about land development plans and projects, and armed with the facts they need to participate constructively. Citizens must also be informed of specific opportunities for involvement and how their participation will influence land use decisions. Public information methods reach large audiences, stimulate interest in community planning, announce citizen participation activities and events, provide notice of public hearings, and inform the public of actions and decisions.

Following are just a few examples of traditional public information methods:

Public Information Methods

Newspaper, Television, and Radio		
Feature Story	Press Conference	News Coverage
Legal Notice	Insert	Paid Advertisement
Editorial	Talk Show	Public Service Message
Other		
Direct Mail	Newsletter	Video Tape/Slide Show
Hotline	Displays & Exhibits	Documentary Films
Speakers Bureau	Telephone Tree	Brochures

The best way to select public information tools is to identify the objective and audience to be informed, and choose the methods based on skills and available budget. Cooperation from the local media is one key to maintaining a solid public information program. Local planning agencies should include funding for public information activities in their yearly budgets.

2. Citizen Interaction

If citizen participation is to be effective and not simply "window-dressing" people need opportunities to:

- *clarify values and attitudes*
- *express their opinions and priorities*
- *create proposals for plans and projects*
- *develop alternative approaches*
- *resolve conflict*

Interactive methods encourage two-way communication and innovative solutions. All of these methods create a dialog among decision makers, professionals, and citizens who will be affected by those decisions. Some interactive methods, such as workshops, are effective throughout a planning process. Others, like surveys, are best limited to specific steps. Interactive methods most frequently used in Washington state are public hearings, public meetings, citizen advisory committees and community surveys.

3. Public Hearings

A public hearing is a special meeting which allows the public to comment on proposed plans and projects before officials make a final decision. Operating under a set of laws and formal procedures, it is an open public meeting. All citizens must be permitted to present their views for the official record, verbally and in writing, before the hearing body makes its decision.

Public hearings are conducted by city councils, boards of county commissioners, planning commissions, and, for certain designated zoning issues, the board of zoning adjustment. Some jurisdictions in Washington have hearings examiners who conduct quasi-judicial public hearings related to land development permits.

It is in the community's best interest to see that public hearings are carefully planned. In addition to the legal aspects of conducting a hearing, the points listed below can significantly increase the productivity of public hearings.

Before a hearing takes place:

1) The responsible agency should carefully examine the proposal or application to see that it is complete, and that all procedures and regulations have been followed.

2) All interested parties should receive ample notice of the hearing.[4]

3) Members of the hearing body should visit the site of all specific development proposals.

4) At least several working days prior to the hearing, staff reports, environmental assessments, economic analysis, and any other documents relevant to the hearing should be available for members of the hearing body and the general public.

5) Printed copies of the hearing body's rules and procedures should be on hand.

HOW TO CONDUCT A PUBLIC HEARING

1	The Chair calls the hearing to order, explains the purpose of the hearing and the procedures to be followed.
2	The Chair is responsible for conducting the hearing in a fair, evenhanded manner, and should request that all questions and comments be addressed through him/her.
3	A brief summary description of the proposal or plan is given by the Chair or a member of the planning staff. A lengthy description of the proposal is not necessary, as the subject of the hearing needs to be announced sometime before the hearing.
4	All visual aids, such as maps and slides showing specific sites or development proposals, must be visible to everyone in the hearing room.
5	The Chair opens the hearing for public testimony when the description of the proposal or plan is completed.
6	Typically, proponents will be heard first, followed by opponents and a short rebuttal by proponents; however, some hearing bodies ask people to sign up if they wish to testify and then call for testimony based on the order of the sign up sheet.
7	The Chair closes the hearing after all testimony is presented; however, it may be necessary to continue the hearing to a future date if there is a great deal of testimony.
8	The Chair thanks all citizens in attendance for their testimony. The hearing body will either debate, deliberate, and make a decision; or take all the information under advisement and make a decision at the next meeting, or announce a specific date when the decision will be made.

Members of the hearing body need to keep a fair and open mind until all testimony is presented. Citizens should be adequately prepared to testify, know the hearing rules and procedures, have a clear statement of purpose for their testimony, and back up their statements with solid information. It is also helpful to the hearing body if citizens prepare written testimony and present only summary remarks at the hearing.

Public hearings are required both for legislative and quasi-judicial decisions. Legislative hearings are conducted to seek citizen views on general land use plans and ordinances. Quasi-judicial hearings deal with individual property. Quasi-judicial hearings (such as rezoning a property from residential to commercial or subdividing several acres in a rural area) are frequently surrounded by conflict. These conflicts often make front page news and are sometimes resolved in the courts, rather than the community.

The standard public hearing provides proponents and opponents of land development projects an opportunity to comment, but it does not work very well as a technique to solve problems or resolve conflicts. For this reason, many private developers are initiating their own citizen participation sessions. They are meeting and consulting with neighborhood

groups in the design stages of project development. These private initiatives have been successful across the state.

Legally required public hearings offer only a limited opportunity for two-way communication. They are most effective if used in combination with other citizen participation methods. Public hearings are not a very expedient method for resolving conflict and can be counter-productive if used as a method to rubber-stamp plans or projects. The advantage of public hearings is that they guarantee citizens' comments on land use issues will be heard.

4. Public Meetings

Designed to inform, educate, or facilitate extensive interaction and dialogue, public meetings[5] are a widely used form of citizen participation. Information and educational meetings are a valid first step in any citizen participation process. Technical information can be distributed, along with an orientation to citizen participation opportunities and general or detailed descriptions of plans and projects.

Problems, however, can occur when the purpose of a public meeting is not clearly stated. Citizens become frustrated and angry if they attend a meeting believing they will be able to express their views, only to discover that the meeting was designed to educate or inform them about plans or projects. The purpose of a public meeting must be announced openly and honestly in pre-meeting publicity.

5. Community Workshops

One of the most popular citizen participation methods is the community workshop. Encouraging extensive interaction, workshops offer a structure that divides many people into small work groups of six to nine individuals. The value in this method is the data citizens develop in the work groups. Each small group prepares a written report, communicated at the end of the workshop to all attendees. Data developed at community workshops can be used throughout the planning process. When people see the goals, priorities, and ideas they have developed in community workshops reflected in land use decisions, they are more likely to support local government plans and projects.

Other advantages of this method are: 1) everyone can participate at meetings; 2) it is an excellent means of developing community consensus; and 3) it is relatively

inexpensive. To be successful, workshop managers must have good group facilitation and data management skills.

Keys to Planning and Conducting Successful Public Meetings and Community Workshops

1 Tell people the purpose of the meeting and have a written agenda.

2 Make sure that the meeting date and time is convenient for the people who are being asked to attend.

3 Notify people well in advance, approximately one to two weeks before the meeting date.

4 The meeting site should be easy to get to, serviced by public transportation, and have ample parking.

5 Select a meeting room that is appropriate for the size of the expected audience. Avoid rooms with pillars, other structural supports, and fixed seats.

6 Make certain there is adequate lighting, ventilation, and a comfortable room temperature.

7 Assure that people will be able to hear speakers and converse in small groups.

PRACTICE TIP: ***People appreciate having the announced starting and ending times observed. One note of warning: speak in English, not planning jargon, at public meetings. Using technical terms that people do not understand has been the downfall of many carefully planned public meetings. Paying attention to details can reduce problems and make public meetings more enjoyable for everyone involved.***

A few words on meeting formats: Information and education meetings are usually set up in a formal manner with a podium and chairs set in rows. Informal arrangements with chairs and tables for small groups are appropriate for workshops. Meeting sponsors often serve coffee, tea, or juice as a way to make people comfortable and help them become acquainted during meeting breaks. Having materials for people to look at and study prior to a meeting, and setting up audio visual equipment well in advance of the starting time are other simple ways to make meetings less stressful for organizers and participants.

6. Citizen Advisory Committees

Citizen advisory committees, which give advice to local officials on a particular plan, project, or program, are very popular for citizen participation. Community or neighborhood committees range in size from small, select groups of individuals appointed by local officials, to large groups of 50-100 volunteers. Advisory committees assure that community values and attitudes are represented in the planning process. They can also underscore obstacles to plans and projects, generate interest in land use planning, and help resolve conflicts among interest groups.

Appointed advisory committees are most efficient when they represent a cross-section of community interests. Volunteer advisory committees are best suited to educate and inform, create interest in community planning issues, and to get feedback on plans and projects. They generally do not represent all viewpoints in the community and may be strongly biased.

In all cases, whether an advisory committee is appointed by local government officials or composed of volunteers, staff support must be supplied to deal with technical and organizational tasks.

7. Citizen Surveys

A citizen survey is often used to gather information about citizen attitudes, values, and priorities. It can also gather data about a community's residents, such as age, income, and employment. Surveys are not a truly interactive participation method; citizens do not communicate directly with decision-makers in a survey, but they can express their opinions on land use issues.

Several types of surveys are used in land use planning. The formal scientific survey systematically measures community attitudes, values, and priorities. Data collected by scientific surveys can statistically represent all citizens' views in a quantifiable manner. Crucial elements in a formal scientific survey are properly designed questionnaires, careful tabulation of results, and a written analysis and interpretation of the data. Survey results must be reported in a straight-forward manner and be widely distributed throughout the community. If the local government staff is not experienced in survey design and analysis, they should seek assistance.

The community self-survey is popular in smaller communities. This method makes extensive use of community volunteers with a minimum of outside assistance. Citizens organize and conduct all aspects of the survey, from developing and distributing questionnaires to tabulating and distributing results to the community. The advantages of this type of survey are that it encourages broad citizen participation and it collects information about community attitudes and priorities. Conducting a community self-survey is a large undertaking. This method should be chosen only if enough volunteers are available and when the survey results are not needed immediately.

Informal methods to survey public opinion include questionnaires printed in the local newspaper, or call-in answers on a talk show. Such surveys will not represent all community views, but can help focus on or uncover land use planning issues. They should not be relied on to develop community plans.

Many other methods have been used successfully in communities across the state. Mediation techniques, for example, can help disputing parties resolve conflicts over land use plans and projects. New methods, such as interactive computer simulations and cable television, are being introduced in citizen participation activities. In selecting among these, communities should be open to new and innovative techniques. However, they must carefully evaluate their ability to execute a particular method. Guiding factors in making a selection are 1) match the appropriate method to each citizen participation objective; and 2) have the skills and resources to carry out the method properly.

A SEVEN STEP GUIDE TO CREATING AN EFFECTIVE CITIZEN PARTICIPATION PROGRAM

1 **DETERMINE OBJECTIVE(S)** of the participation program. Write them down, in plain English, so everyone can understand the purpose of the program.

2 **IDENTIFY WHO** should be involved by identifying who will be impacted by the plan, ordinance, or project. These are the citizens who need an invitation to participate.

3 **DECIDE WHEN** to invite/recruit citizen involvement. This step must be consistent with Step 1. For example, if the objective is to have citizens develop initial ideas for plans, people must be involved at the beginning of the process. If the objective is to have people review and comment, it will not be necessary to plan for involvement until draft proposals are available.

4 **IDENTIFY AND EVALUATE A VARIETY OF METHODS** that are appropriate to carry out the program objective(s). Typical evaluation criteria are: the cost of the method; the ability of staff (volunteer and professional) to administer the method; the amount of time needed by citizens; the amount of time needed by staff to process data generated; and the quality of that data.

5 **SELECT THE BEST METHOD(S)** to achieve each program objective. Be sure they are within the resource capabilities, both financial and human, of the community.

6 **CARRY OUT** the citizen participation program.

7 **EVALUATE THE PROGRAM** when it has been completed. Decide if objectives have been met, list what went well and what could be changed or improved for the next time.

Part 2: The Public Process

Public involvement in local planning and land use decisions in Washington communities takes place within a formal structure established by law. Procedures governing how public meetings are conducted relate to the general statutes and case law governing the conduct of public officials. Some of these requirements apply specifically to planning commissions; all of them, however, are important in conducting public agency business.[6]

A. Public Meetings/Executive Sessions

1. Open Public Meetings—In General

Planning commissions, hearings examiners, and city and county governing bodies operate under the umbrella of the state's public meeting and public document laws.

With a few exceptions, the Open Public Meetings Act[7] requires the governing bodies of public agencies to keep all meetings at which action is taken open and accessible to the public. Multi-member planning commissions are considered governing bodies of public agencies under the Act.[8]

"Action," as used here, includes substantive deliberations or the receipt of evidence, as well as formulating findings or taking final votes.[9] Thus, if a quorum of a governing body meets at any time or place and engages in any discussion or deliberation about agency business, the result is a meeting that must comply with open meetings requirements. Subcommittees of a governing body also are considered governing bodies if they exercise delegated powers, hold hearings, or take testimony or public comment.[10]

Open meeting requirements of the Act (including proper procedures for notice and conduct) apply to all regular or special meetings, even when they are called "work sessions" or "study sessions." There are times, however, when the public does not have a right to participate in all activities of an "open" meeting. While agendas, staff input, commission deliberations, work sessions, and briefings are all activities proper at public meetings, the commission or council may permit or exclude public participation, as appropriate to the circumstance. Only at specific public hearings is the commission or council required to solicit and listen to public input on a specific subject.[11]

Planning commissions and city or county legislative bodies hold two types of meetings:

a. Regular Meetings

A regular meeting is held at fixed times established by ordinance, resolution, or similar rule. Once properly established, regular meetings require no separate public notice. A regular meeting normally follows an agenda; but all business of the body may be transacted at such a meeting, including matters raised at the meeting but not listed on the agenda.[12]

b. Special Meetings

Any meeting not set by resolution for general meeting purposes is a special meeting.[13]

To hold special meetings, public agencies must comply with additional rules. First, written notice of the meeting identifying the time, place, purpose, and agenda items to be discussed must be delivered to each member of the body at least 24 hours in advance, either by mail or personal delivery. This requirement is waived by attending the meeting, and may be waived in writing either before or after the meeting, by any person entitled to notice.

Written notice of special meetings, including the agenda, must be sent to every newspaper, radio station, or other organization or person that has requested in writing to be notified of special meetings.

Board action at special meetings is limited to matters identified on the agenda and published in the special notice. Thus, matters not on the special notice cannot come before the board for action. While technically permitted, it is best to avoid "discussion" of non-agenda items. This often leads to *de facto* decisions, which violate the Act and may invalidate later formal action.

2. Closed Meetings—"Executive Sessions"

Meetings at which the public may be excluded from deliberations ("executive sessions") are narrowly defined. These include matters pertaining to certain personnel matters, real estate acquisition, selling or leasing property, and, under

certain circumstances, consultations with the agency's legal counsel.[14]

"Executive sessions" commonly involve sensitive personnel matters (such as evaluations of individual employees) and sensitive legal consultations. Closed discussions of agency enforcement actions and "litigation or potential litigation" which may involve the agency or its officials are permitted by statute when public knowledge of the discussions would harm the agency.[15] The exemption generally includes discussions of legal alternatives, where the agency's decision could result in litigation. Most other legal discussions pertaining to non-controversial agency business must take place in open meetings.

Note: The statute generally allows only "discussion" or "consideration" of specified matters in executive session. Any final action must be taken in the subsequent open session.

Notice rules that apply to public meetings also apply to executive sessions. Before the executive session begins, the public meeting is convened and the presiding officer announces:

- *The board is going into executive session.*
- *The purpose of the session and the reason it is exempt.*
- *The length of time the session will last.*[16]

When the session ends, the presiding officer returns the meeting to public session and discloses the nature of the meeting for the record. He or she may adjourn the meeting if there is no other business before the board, or proceed to other agenda items.

3. Conduct of Meetings

The Open Public Meetings Act encourages public attendance at meetings.[17] Any conduct that could discourage attendance (such as requiring all attendees to sign up for the meeting) is prohibited.[18] Sign-up sheets for those who wish to speak at a public hearing, however, are appropriate and recommended. When large crowds are expected, sign-in sheets should be numbered so testimony can be taken in order. If attendees behave in a disorderly manner, the body may expel the offenders or relocate the meeting.[19] For an accurate record of

the proceedings, persons who want to speak may be required to identify themselves.

By law, minutes must be taken and recorded promptly for all public meetings, except executive sessions.[20] Stenographic notes and tapes are not considered minutes unless they are officially adopted as such. If a public agency does not produce written minutes, the adoption of tapes or notes of previous meetings as the "official meeting record" should be an agenda item at every meeting. Under the public records law, these documents may be subject to public inspection.

If proper notice or procedures for open meetings are not followed, any action taken will be invalidated.[21] Persons who violate the Open Public Meetings Act are also subject to a $100 penalty for each violation, so responsibility rests with the deliberative body (and usually the presiding officer) to check for procedural compliance before taking action.[22]

While state law does not prescribe any specific meeting protocol, communities are encouraged to adopt, publish, and follow an agenda format. A consistent agenda format will make it easier to follow community business. Some communities publish upcoming subjects for future meetings in the agenda package. Advance notice allows everyone interested in the topics to prepare and spread the word, increasing public participation.

Written staff reports should be available several days in advance. This will give the commissioners or council members and other participants time to understand the case and prepare their comments. A staff or committee presentation of matters to be decided is common at public hearings. Where projects are involved, the applicant usually has the opportunity to address the proposal and its consistency with local codes and ordinances.

At large hearings, testimony should be organized so everyone is heard and the evidence is presented in a logical fashion.

Acceptable alternatives for large hearings include (a) testimony taken in order of sign up, (b) all testimony in favor, then all opposed, or (c) alternating favorable and opposition testimony. Time limits may be imposed, although written comments should be solicited when the subject cannot be covered in a brief public comment. Finally, groups should be given more time to organize joint comments or presentations, reducing the number of comments needed.

If a meeting runs overtime or needs to be continued, the presiding officer must adjourn the meeting to a stated time and place.[23] A notice of adjournment is then posted promptly on the door where the meeting was held. If the adjourned meeting was a special meeting, written notice of adjournment must be mailed to all who are given notices of special meetings. Once reconvened, the meeting may continue as if there were no adjournment. There is no limit to the number of times a meeting may be continued.[24] However, one must bear in mind that certain actions of the deliberative body are to be taken within independently established deadlines. For instance, a preliminary plat application must be either approved, denied, or returned for modifications within ninety days from filing and a final plat application within thirty days, unless either time period is extended.[25] Other deadlines may apply as well, either by state law[26] or local ordinance. The governing body must therefore be careful when it repeatedly continues matters to subsequent meetings.

B. Public Documents/Confidential Documents

1. Public Records or Freedom of Information

Washington's open public records provisions,[27] modeled after the federal Freedom of Information Act,[28] are sometimes called the state's Freedom of Information Act. Washington adopted its Public Records Act by initiative in 1972.[29]

The public purpose of the Freedom of Information Act is stated boldly in broad, sweeping language.[30] The definition of records, for instance, is so broad that it suggests members of the public can inspect and copy any transcription of thought or speech in the agency's possession related to agency business.[31] There are exceptions, of course, designed to protect the public interest as well as privacy rights of individuals in some cases.[32]

2. Duty of Public Agency to Facilitate Access to Records

An agency must establish procedures for providing access to its records. Indexes should be created and published.[33]

All records must be available for public inspection and copying during customary office hours. If an agency has no regular office hours, the hours are set by statute.[34]

The agency must make its facilities available for the public to make copies of its records, or must make the copies itself upon request. The agency may charge for the cost of making copies, but only at the actual cost. The agency may not charge for making record searches or allowing inspections.[35]

3. What Records May Be Withheld

The Public Records Act provides a variety of specific, narrowly construed exemptions. One exemption from disclosure that might be involved during the planning process is for "Valuable formulae, designs, drawings, and research data obtained by any agency within five years of the request for disclosure when disclosure would produce private gain and public loss."[36] Note the requirement of "public loss."

There is an exemption for records of archaeological sites and for certain business records protected under other statutes.[37] Washington appellate courts have held on several occasions that agencies cannot simply create confidentiality for records—for instance, by agreement with a private party—without statutory authority. For example, an agency or public official cannot accept an employment application with the understanding that the applicant's business records submitted with it will be confidential. An exemption for this purpose was sought during several legislative sessions, but has yet to be enacted.

An agency may apply to a court for an exemption for a particular record when disclosure would harm "vital governmental functions."[38] However, this standard is difficult and uncertain to meet.

4. Procedures for Access—Remedies

An agency must make its records available promptly on request. It must provide a reason for denying access and must establish procedures for reviewing requests. The law establishes schedules for prompt action by the agency. Municipalities should adopt ordinances or resolutions identifying the method and manner for requesting public documents, the person or persons responsible, and the time within which answers should be provided.[39]

A person whose request for inspection or copying is wrongfully denied has the right to sue the agency and force it to produce the record. If successful, the requesting person might be entitled to reimbursement for legal costs and may be awarded up to $100 per day for each day the request was denied. Generally, the agency has the burden of proving its denial was justified.[40]

5. Conflicts of Interest

The law strictly forbids public officials, including planning commissions, to have personal financial interests in contractual matters they are supervising.

> *No municipal officer shall be beneficially interested, directly or indirectly, in any contract which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his or her office, or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein.*[41]

These rules rarely apply in planning cases; they are usually limited to situations where the municipality is contracting for consultants to review a project or proposal, or make studies for the community.

6. Nonfinancial Conflicts

The rule of incompatible offices is a nonfinancial conflict which may arise. Courts generally hold that a public official may not hold two offices simultaneously that are incompatible with each other,[42] unless expressly permitted by statute. Examples include two offices in which one has supervision over the other, or offices that at times may hold opposing duties, such as the simultaneous appointment of one person as (a) mayor and planning director; or (b) council member and planning commissioner; or (c) boundary review board member and elected official involved in annexations.

C. Appearance of Fairness

Appearance of fairness is a judicial doctrine that may arise when (1) public hearings are required, (2) a decision must be made based on evidence in the record, and (3) the decision is based on applying policy to a specific situation, rather than creating a new policy for the community.[43] The appearance

of fairness doctrine arises from the judicial perspective that certain actions of local officials must not only be fair in fact, but conducted in a manner that is fair in appearance.[44]

The courts divide zoning and planning actions into two functions. Actions that involve the public as a whole (rather than a particular project or proposal) are called "legislative actions." Examples include area-wide zoning actions or comprehensive plan modifications. But when a project or proposal is at issue, especially if policy is applied to a specific parcel or small group of parcels, the action is termed "quasi-judicial."[45]

The distinction between the two is that broad public policy declarations are legislative actions; applying that policy to a particular situation through hearing, findings, and creating a record is a quasi-judicial proceeding.[46]

In the quasi-judicial setting, the appearance of fairness doctrine holds that the decision-maker must not have conflicting interests or preconceived views on a project. This ensures that: (1) the decision is made on the record; (2) the decision-maker has no entangling alliances that would make it appear that he or she might favor one side over the other; and (3) the proceedings are conducted in a manner that appears fair.

As stated by the Supreme Court when the doctrine was first articulated:

> *It is axiomatic that, whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, a hearing not only fair in substance, but fair in appearance as well.*[47]

The reasoning behind the appearance of fairness doctrine is twofold:

The first applies if the community establishes a policy applicable to a certain situation. Each participant in the proceeding has the right to have a matter judged on its merits by unbiased officials who are not influenced by financial or personal interests.

Second, because any quasi-judicial decision is open to court review, all factors in a decision must be on record for the court's evaluation. Where one or more of the decision-makers have interests or contacts outside the record that influence the

decision, the rights of all parties to have the matter decided on the record may be compromised. This is why the court articulated the appearance of fairness doctrine.

The doctrine has now been codified and clarified by statute.[48] Key points to keep in mind include:

DOCTRINE OF FAIRNESS

- The doctrine applies only to actions that determine the legal rights of specific parties in a hearing or contested case proceeding.
- Contact with a constituent by a decision-maker will not result in an appearance of fairness claim if the contact is during the course of the official's business and does not involve issues in a contested hearing.[49]
- Where ex parte contacts occur (i.e., between an official and only one of the interested persons in a case), the official must disclose the contact and substance of the contact on the hearing record.[50] Disqualification may still follow if the contact could prevent the official from fairly deciding the case on the record.[51]
- Persons will not be disqualified for comments they made before declaring for public office, or while campaigning for public office.[52]
- Persons may not be disqualified on the basis of campaign contributions, if they follow campaign disclosure laws.[53]
- Planning commission members, having made a recommendation to county or city officials, are not barred from participating in further proceedings.[54]
- The appearance of fairness doctrine cannot be used to defeat a quorum if the member or members first disclose the basis for their disqualification.[55]
- None of the exceptions to the doctrine apply if the result is a hearing that is actually unfair (due process violation), as opposed to simply appearing unfair.[56]

Here are three keys to a successful quasi-judicial proceeding:

1. **Keep an accurate record of the hearing.** All applications, exhibits, reports, letters, and written and oral comments on the project should be part of the record.

2. **All decision-makers should disclose special interests they may have in any matter before the particular body.** When a decision-maker has a vested interest or predisposition to a specific outcome

(such as a financial or other personal interest that would prevent an unbiased decision, or a personal relationship with the applicant or the opponent), that decision-maker should withdraw from consideration and voting on the matter.

3. **The decision should be written and on the record** (see discussion below).

D. Public Decisions and Creation of Records

1. Conduct of the Initial Hearing

The manner in which hearings and meetings are conducted is important in two respects. 1) Meetings must be conducted so they are fair, both in fact and appearance, to persons affected by their outcome. 2) Planning agency action or non-action involving factual questions must be defended effectively on appeal through the case record.

2. The Requirements for an Adequate Record

Washington courts make it clear that an adequate record is the key to successful land use decisions.[57] When any decision is to be made on the record, the municipality must maintain an adequate record of all proceedings.

The record should contain the following elements:

AN ADEQUATE RECORD

- The application and supporting documentation.
- The environmental determination and any supporting documentation.
- Any staff report and prehearing correspondence pertaining to the case, including all agency or department comments and letters from interested citizens.
- A verbatim record (usually taped) of any hearing in the case.
- Any exhibits offered during the hearing should be numbered and kept as part of the record.
- Nothing is part of the record unless it appears on the tapes or in exhibits offered as evidence in those proceedings.
- Comments must appear on the record before they can be considered in evaluating an application. All oral comments to be considered should be made into a microphone provided

for that purpose. This will ensure they appear on the record. The Chair should instruct persons offering comments or testimony to speak into the microphone and identify themselves. Otherwise, the Chair should ask them to repeat the remarks into the microphone for the benefit of the record. This same requirement applies to testimony by staff and officials. Comments not so recorded may not be considered in making the final decision.

- If a tape ends, the Chair should stop the proceeding and forbid any further testimony until a new tape is inserted and playing. Using the microphone, the Chair should announce that the tape has just been changed. Anyone whose testimony was made after the previous tape had run out, should be invited to repeat his or her comments for the record, with a warning that comments not on the tape will be disregarded.

- No map, drawing, or sketch should be discussed unless the document is offered, marked or labeled, identified on tape, and kept as a part of the record. When a document is accepted as an exhibit, the secretary should affix an exhibit designation to it. In some instances (as with an exhibit of substantial value to the owner) an exact copy of the document is acceptable for the record. The name and nature of the document should be noted on the tape; and in whose possession the original document will remain, if it is needed for evidence. The exhibit should be photographed or copied for the record.

- Hearings should be closed formally by motion. When a hearing ends, deliberations should be initiated promptly, and no other testimony or evidence considered by the hearing body.

The decision-making body may begin deliberation or may continue the proceeding to a new work session or meeting. If new evidence is to be received, the commission or council must take steps to reopen the record and properly receive the new materials.

Failing to maintain an accurate record when using tape recordings will cause problems for a municipality. The Court of Appeals gave the following admonition in a case where an inadequate record caused significant problems:

> *We strongly urge that where proceedings are electronically recorded great care be taken to ensure usable recordings. To that end, we suggest:*
>
> 1. *If possible, high quality multi-track recording equipment with multiple microphones should be used. This would enable the transcriber to play back one track—hence one voice—at a time.*
>
> 2. *Proceedings must be organized to facilitate recording. Thus, speakers must be required, and reminded if necessary, to speak into the*

microphones; to identify themselves before speaking, spelling out their names; to stay at the microphones while speaking; and to talk rather than rely upon bodily gestures to convey meaning.

3. *The person operating the recorder should monitor the recording, check the tape after periods of increased background noise to determine whether testimony was recorded, and ask the speaker to repeat the testimony if it is inaudible.*[58]

3. The Need for Findings and Conclusions

Written findings of fact and conclusions state the principal factual and legal basis for a decision. A finding does not recite the evidence, but rather demonstrates that the criteria for a decision have been met. (Take, for example, a plat in a 4 dwelling units per acre minimum zone. Finding: The plat has a density of 4.25 dwelling units per acre. Conclusion: The density requirements of the code have been met.) If the record does not support the findings, or the findings do not support the conclusions, or if neither support the decision, a reviewing court may reverse the decision.

Statutes governing the actions of quasi-judicial officials require adequate findings:

> *Both the board of adjustment and the zoning adjuster shall, in making an order, requirement, decision or determination, include in a written record of the case the findings of fact upon which the action is based.*[59]

Written findings and conclusions are also required when any jurisdiction decides to use a hearings examiner;[60] or, when subdivision actions are taken.[61]

The requirement for adequate records and findings applies to more than quasi-judicial project approvals. Under the Planning Enabling Act,[62] planning commissions must act by a majority of the whole, not simply of the quorum, and must produce adequate findings.

> *The recommendation to the board of any official control or amendments thereto by the planning agency shall be by the affirmative vote of not less than a majority of the total members of the commission. Such approval shall be by a recorded motion which shall incorporate the findings of fact of the commission and the reasons for its action....*[63]

The Planning Enabling Act also requires that the commission's recommendations be accompanied by the motion and a statement of factors considered at the hearing, with an analysis of controlling findings.[64]

4. The Administrative Appeal

Local governments are no longer required to provide for administrative appeals.[65] If no administrative appeal is provided, then a challenge to a local land use decision is directly to superior court.

If an administrative appeal is provided, the legislative body has appellate jurisdiction. When operating by appellate jurisdiction, the decision is based only on the record made before the hearing official. Under this system, the legislative body does not conduct a second hearing,[66] and will not take testimony for its record.

The only questions needed in an appellate model are: (a) are the decision-makers' findings supported by evidence in the record, and (b) did the decision-makers correctly apply adopted county/city policy? The legislative body may not adopt new findings based on the evidence before the decision-maker, or hold hearings to elicit new evidence. The record below is the sole basis for the decision on appeal.

5. Superior Court Appeal

Once local officials make a final decision, further appeal is by a petition to superior court under the Land Use Petition Act ("LUPA").[67] The reviewing court generally considers only the record created at the local level. This is why an accurate record of all proceedings must be maintained. If the only record available is inaccurate or incomplete, the court will usually void the local action and remand the case for a new (de novo) hearing. A verbatim (word-for-word) transcript of the proceedings is usually required.

Reviewing courts have identified these prerequisites for adequate judicial review:

- *A well-defined record, identifying the nature of the decision and its basis.*
- *Findings that identify the standards considered and the factual basis for action.*
- *A clear expression of action taken by the decision-making body, the persons or entities affected by the action, and the extent of such effects.*

Communities can take comfort in the fact that few cases are ever appealed to court, and only a small percentage of them rule against the city or county. Accuracy and clarity of the record is a community's first line of defense in such cases.

An appeal under LUPA must be filed within 21 days of the issuance of a land use decision.[68] The 21-day limitations period contained in LUPA, together with the Act's service requirements, must be adhered to carefully. In a recent court of appeals case, the dismissal of a petition was upheld where service of the petition occurred 20 minutes after normal office hours on the last day of the 21-day period.[69] An appeal period may begin to run on the date of an oral decision at a public meeting where the decision rendered is final and conclusive.[70] The appeal period for written decisions, including "decision documents" prepared in advance of a vote, begins to run three days after the written decision is mailed.[71]

To obtain judicial review under LUPA, the petitioner must first exhaust all of his or her administrative remedies.[72] If the only administrative remedy available to a project opponent is participation in a public hearing process, the remedy may be exhausted by writing and speaking against the proposed decision.[73] A number of other recent opinions have further clarified what constitutes the exhaustion of administrative remedies for purposes of LUPA.[74]

LUPA requires courts to accord due deference to a local jurisdiction's construction of a statute or ordinance. Where a municipal ordinance is unambiguous, the court will look to the plain meaning of the language used in the statute. Where a legislative enactment, or ordinance, is ambiguous, the court may seek the expertise of the agency when construing its meaning.[75]

The doctrine of res judicata bars the retrial of the same claim in a subsequent action. The doctrine applies in the quasi-judicial administrative context and stands for the general proposition that "a controversy should be resolved once, not more than once."[76] Res judicata will bar a claim when a prior final resolution is similar in four respects to a subsequent proceeding: There must be a common identity of (1) subject matter; (2) cause of action; (3) persons or parties; and (4) the quality of the persons for or against whom the claim is made. Thus, under LUPA, where an agency has previously rendered a final decision on a landowner's application, that landowner may not retry the same claim at a later date unless there has been a substantial change in circumstance or conditions relevant to the application, or a substantial change in the application itself.[77]

Finally, the superior courts have inherent authority under the Constitution to review agency action by writ of certiorari to determine if the action is arbitrary and capricious or contrary to law.[78] Agency action is considered arbitrary and capricious if it is willful and unreasoning, taken without consideration and in disregard of the facts and circumstances.[79]

ENDNOTES FOR CHAPTER 2

1 RCW 36.70A.020(11).

2 WAC 365-195-010(3).

3 RCW 36.70A.140.

4 RCW 36.70B.110(11) requires a public comment period and sets forth specific requirements for providing notice of a land use project hearing.

5 RCW 36.70B.020(5).

6 For a more detailed analysis of this subject, readers should consult Knowing the Territory, published and periodically updated by the Municipal Research & Services Center of Washington, November, 1991.

7 Chapter 42.30 RCW.

8 RCW 42.30.020(1)(c).

9 RCW 42.30.020(3).

10 RCW 42.30.020(2).

11 RCW 42.30.030 requires meetings be open and all persons be permitted to attend any meeting; it does not require that persons be permitted to participate.

12 RCW 42.30.070 &.075.

13 RCW 42.30.080.

14 RCW 43.30.110.

15 RCW 42.30.110(1)(i).

16 RCW 42.30.110(2).

17 See RCW 42.30.010 & .030.

18 RCW 42.30.040.

19 RCW 42.30.050.

20 RCW 42.32.030.

21 RCW 42.30.060.

22 RCW 42.30.120(1).

23 RCW 42.30.090.

24 RCW 42.30.100.

25 RCW 58.17.140.

26 See, e.g., RCW 36.70B.070 & .090.

27 RCW 42.17.250 - .348.

28 5 U.S.C. § 552.

29 Initiative Measure No. 276, approved November 7, 1972, eff. January 1, 1973.

30 RCW 42.17.290.

31 RCW 42.17.250 & .260.

32 RCW 42.17.310 & .315.

33 RCW 42.17.260 & .290.

34 RCW 42.17.280.

35 RCW 42.17.300.

36 RCW 42.17.310(1)(h) (emphasis added); Servais v. Port of Bellingham, 127 Wn.2d 820, 904 P.2d 1124 (1995). But see Lindberg v. Kitsap County, 82 Wn. App. 566, 919 P.2d 89, review granted, 130 Wn.2d 1025,

930 P.2d 1229 (1996) (site and drainage plans for proposed residential development were not exempt from copying under The Public Records Act).

37 RCW 42.17.310(1)(k) & (m)(o)(r)(z)(bb) & (ff).

38 RCW 42.17.330.

39 RCW 42.17.250 & .320.

40 RCW 42.17.340.

41 RCW 42.23.030.

42 Kenneth v. Levine, 50 Wn.2d 212, 310 P.2d 244 (1957).

43 Smith v. Skagit County, 75 Wn.2d 715, 739, 453 P.2d 32 (1969); but cf. Polygon Corp. v. Seattle, 90 Wn.2d 59, 67-68, 578 P.2d 1309 (1978) (holding that the appearance of fairness doctrine does not apply to administrative actions, such as the issuance of a building permit, except where a public hearing is required by statute).

44 Id.

45 Raynes v Leavenworth, 118 Wn.2d 237, 821 P.2d 1204 (1992).

46 Zehring v. Bellevue, 99 Wn.2d 488, 663 P.2d 823 (1983).

47 Smith, 75 Wn.2d at 739.

48 Chapter 42.36 RCW.

49 RCW 42.36.020; See Organization to Preserve Agricultural Lands v. Adams Cy., 128 Wn.2d 869, 913 P.2d 793 (1996) ("OPAL") (an ex parte communication between a member of an administrative quasi-judicial decision making body and an interested party that occurs before a matter is set to be heard by the body does not render the subsequent decision invalid if all parties have been given extensive opportunity for input on the issues or if the party challenging the appearance of fairness is unable to demonstrate that the communication concerned the proposal which is the subject of the quasi-judicial proceeding).

50 An administrative decision maker's failure to disclose an ex parte communication does not render the administrative decision invalid if the communication has, in fact, been rebutted in the course of the administrative proceeding. OPAL, 128 Wn.2d at 889.

51 RCW 42.36.060.

52 RCW 42.36.040.

53 RCW 42.36.050.

54 RCW 42.36.070.

55 RCW 42.36.090.

56 RCW 42.36.110.

57 Bennett v. Board of Adjustment, 29 Wn. App. 753, 755 n.2, 631 P.2d 3 (1981).

58 Bennett, 29 Wn. App. at 755 n.2 (emphasis in original).

59 RCW 36.70.900.

60 RCW 36.70.970(3).

61 RCW 58.17.110.

62 Chapter 36.70 RCW.

63 RCW 36.70.600.

64 RCW 36.70.610.

65 RCW 36.70B.110(9).

66 In fact, only one hearing at which testimony is heard and evidence is taken can be conducted on any project permit application. RCW 36.70B.060(6).

67 Chapter 36.70C RCW.

68 RCW 36.70C.040.

69 San Juan Fidalgo Holding Co. v. Skagit County, 87 Wn. App. 703, 943 P.2d 341 (1997).

70 Kilpatick v. City of Anacortes, 84 Wn. App. 327, 927 P.2d 227 (1996).

71 Hale v. Island County, 88 Wn. App. 764, 946 P.2d 1192 (1997).

72 RCW 36.70C.060(2).

73 Citizens for Mount Vernon v. Mount Vernon, 133 Wn.2d 861, 947 P.2d 1208 (1997) (citizens for Mount Vernon also rejected the argument that a city council's approval of a land use project must be appealed to the Growth Management Hearings Board in order to comply with LUPA's exhaustion requirement).

74 Smoke v. Seattle, 132 Wn.2d 214, 937 P.2d 186 (1997) (an applicant was not required to seek a code interpretation by the Director in order to exhaust its remedies); Phillips v. King County, 87 Wn. App. 468, 943 P.2d 306 (1997) (the court rejected King County's argument that the landowner was required to challenge the County's approval of a development by filing a writ action before he could pursue other courses of action); Ward v. Board of Skagit County Commissioners, (the court of appeals affirmed that the exhaustion requirement contained in LUPA applies to all who seek judicial review.)

75 McTavish v. City of Bellevue, 89 Wn. App. 561, 949 P.2d 837 (1998).

76 Davidson v. Kitsap County, 86 Wn. App. 673, 937 P.2d 1309 (1997).

77 Davidson, 86 Wn. App. at 681.

78 Washington State Constitution, Article IV § 6.

79 Saldin Sec. v. Snohomish County, 134 Wn.2d 288, 949 P.2d 370 (1998); Crosby v. City of Spokane, 87 Wn. App. 247, 941 P.2d 687 (1997); Department of Corrections v. Kennewick, 86 Wn. App. 521, 931 P.2d 1119 (1997).

CHAPTER 3.
GROWTH MANAGEMENT